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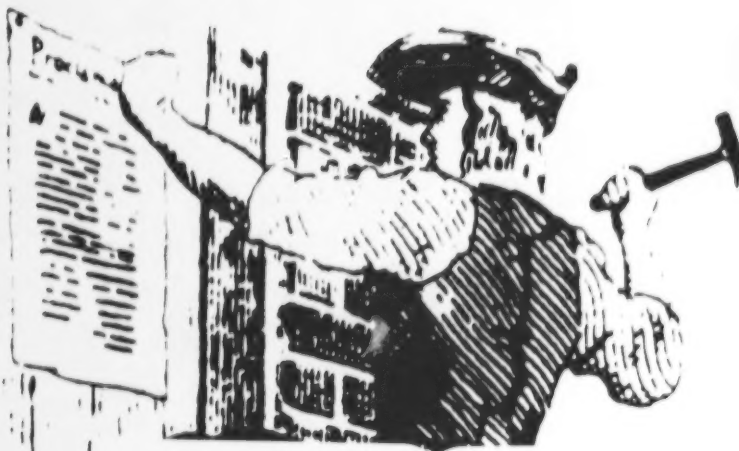
Even though the first citizens of the United States were skeptical about singular authority, the Constitution gave the president independent authority and strong powers. But as chief executive, he would be responsible to the people for the exercise of those powers. The modern presidency is a product of 200 years of growth and experience, yet much of the complexity seen in the office today is a product of the last 50 years. The current White House staff has grown to approximately 500, required by the ever-expanding role of government in these complex times. This large staff necessitates that each president develop his/her own personal managerial style. Some question whether such a powerful presidency tends to overawe Congress and exert too much power, and if the ever-increasing size of the executive branch drains the energies of the president and reduces his/her ability to lead and govern. Others call for a more powerful president and argue in favor of a line-item veto. Throughout history, the flexibility of the balance of powers has helped to maintain a strong and enduring form of government, able to withstand the constant battle for supremacy between the executive and the legislative branches. The document concludes with a list of 18 references. (PPB)

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The Executive Branch and the Constitutional Order



Commission on the Bicentennial
of the United States Constitution
808 Seventeenth Street, N.W.
Washington, D.C. 20006

INTRODUCTION

"If the blessings of our political and social condition have not been too highly estimated, we cannot well overrate the responsibility and duty which they impose upon us. We hold these institutions of government, religion, and learning to be transmitted, as well as enjoyed. We are in the line of conveyance, through which whatever has been obtained by the spirit and efforts of our ancestors is to be communicated to our children."

Daniel Webster

From a speech delivered at Plymouth

December 22, 1820

Two hundred years ago, the American people became the first to establish government by acts of popular consent. That consent was the product of an extraordinary national dialogue on the elementary principles of the government being established, led by men who had experience in local and state affairs. From the fall of 1787 through the summer of 1788, Americans debated the merits of the new constitution framed in Philadelphia. On both sides, opinions were stated, challenged, and defended. And once the decision was made, something remarkable happened: the losing side, the Antifederalists, who had claimed that the new government would destroy their freedom and rights, joined their opponents in making the government work.

Today, we still have a government that thrives on argument, dispute, and debate. But is it still working? In 1789, the responsibilities of the new federal government could be managed by a part-time Congress and a small executive branch. The minuscule federal judiciary of just 19 judges, created in 1790, carried a case-load so light that some justices thought it scarcely worth their time. Today, the federal government's work-load is vast; in fact, the government payroll today exceeds the population of the United States in 1789. How have our institutions of government, designed in the eighteenth century, adapted to the requirements of the nineteenth and twentieth? How will they respond to those of the twenty-first? If the adoption of the Constitution was worthy of a solemn national debate, its adaptation to conditions, past, present, and future, seems equally deserving.

To facilitate this discussion, the Commission on the Bicentennial of the United States Constitution sponsors the College-Community Bicentennial Forums. Public awareness of the Constitution and its continuing importance can best be fostered by linking the political issues of the moment to its underlying principles and historical development. The idea of constitutional government is, in America, the foundation of all attempts to resolve questions of public policy. Today as in 1787 it provides the frame for all our ideas about politics. Yet the Constitution is often left out of current discussions of politics -- its influence, though profound, is unconscious. The College-Community Forums are designed to provide an avenue for public reflection about our institutions of government and to promote a deeper and more widely shared understanding of the Constitution among the general public. It is the Commission's hope that through these Forums, not only the institutions of government, but also the inquiring, experimental spirit of the Founding generation, can be enhanced for generations to come.

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THE EXECUTIVE BRANCH AND THE CONSTITUTIONAL ORDER

In *The Federalist Papers*, Alexander Hamilton praised the Constitution for creating an "energetic" Executive. In the succeeding 200 years, great Presidents have fulfilled Hamilton's expectation of strong leadership -- though not without controversy. The "energetic" Presidents were often subjected to extreme partisan attacks and labeled as would-be tyrants. Yet the activist Presidents are among the most frequently praised. Do Americans expect contradictory things from the person who holds the office of President? Perhaps more than any other institution created by the Constitution, the Presidency has been a focus of controversy and debate. Probably this derives from the initial opposition to a single Executive, who was viewed by some as too much like a monarch. That debate began almost as soon as the Constitution was signed in Philadelphia, and even today controversy continues about the scope of presidential power.

To the Antifederalists of 1787, history and republican theory suggested that, sooner or later, the Executive would swallow up all the other powers of government. From the beginning, the American spirit was skeptical about singular authority; Americans' experience of George III was fresh in mind. As a consequence, most of the early state constitutions gave governors limited powers, or limited their discretion in exercising their powers, or kept their appointments very short, or a combination of the three. Many were elected by the state legislatures. In contrast, the Constitution gave the newly-created President independent authority and important powers -- he would even have the power to veto bills passed by Congress. Moreover, the President would wield this power alone; as Chief Executive, he would be responsible to the people for its exercise. Responsibility can be fixed for the acts of a single Executive more readily than for the decisions of a Legislature of hundreds. Despite these great powers, Hamilton argued, the Presidency would be both energetic and safe:

The ingredients which constitute energy in the executive are unity; duration; an adequate provision for its support; and competent powers.

The ingredients which constitute safety in the republican sense are a due dependence on the people, and a due responsibility. (Federalist 70.)

One reason for Hamilton's confidence that the Presidency would combine these qualities was probably his respect for the man everyone assumed would be the first President: George Washington. It was Washington who would give the vague clauses of Article II their substance and whose administration would set the critical precedents for later relations with the Judicial Branch and Congress:

When Washington took his oath of office in April 1789... far from everything being settled, virtually nothing was. Not only were a multitude of details of organization, procedure, and etiquette yet to be decided; the underlying question of what executive power in a republic was to be had scarcely been asked seriously. ... "With a truly 'peculiar' restraint -- or spectacular shrewdness -- the Founding Fathers thus left the Presidency, their most special creation, to be shaped by the live touch of history." (Ketcham, Presidents Above Party, p. 8.)

We may wonder today whether the modern Presidency, shaped by 200 years of the "live touch of history," still meets -- or should be measured by -- Hamilton's tests. It might be argued that the executive power cannot be called a "unity" when the President's personal staff alone numbers over 500 people and even the simplest presidential action must be reviewed by layers of bureaucracy. Some have questioned whether the "duration" of the Presidency is still sufficient when a full year must be devoted to campaigning for office and when programs, budgets, and revenues are "locked in" for years. One might ask if a modern President has "competent powers" in foreign affairs when Congress demands participation through a War Powers Act. And what of safety? It might be argued a presidential staff that can act in the President's name does not provide the kind of "due responsibility" to the people that republican government demands. Is a President in the final years of a second (and, by the 22nd Amendment, last) term truly "dependent" on the people? Would a single six year term, as is sometimes proposed, provide such dependence?

The modern Presidency is the product of two hundred years of growth and experience, yet much of the complexity we see in the office today is a product of the last fifty years. Until 1857, there was no appropriation for presidential staff; in that year Congress gave the President the funds to pay a single clerk. Even as recently as 1928, the final year of the Coolidge administration, the

total White House budget for staff and office expenses was less than \$80,000.

Since 1928 the size of the White House staff has steadily increased, along with the growth of government employment in general, including Congress with a staff of thousands. By 1953 -- just 25 years later -- the size of the White House staff had grown to some 250; twenty years later it had doubled to 500. President Carter initially reduced the size of the staff somewhat, but by the end of his term it had grown again, and has remained about 500 under President Reagan. (See Michael Nelson, *The Presidency and the Political System*, pp. 356-357.)

Yet the burdens of the office have also increased dramatically since President Coolidge left office. The expanded role of the federal government means that modern Presidents require information and expert analysis on a vast array of subjects, in foreign policy, economic policy, health, education, energy, technology, military policy, and many other areas. And in many cases this information must be available instantaneously. This information, and the staff needed to collect and analyze it, are necessary if the President is to continue to provide the combination of policy and executive leadership that characterizes the modern Presidency. Students of the modern Executive Branch have questioned whether the Presidency has the constitutional, organizational, and institutional ability to do the job.

Different Presidents have had different ideas about the proper sphere of executive power and executive leadership, as well as different styles of management.

There are no immutable designs for organizing the presidency -- schemes that usefully transcend a particular administration. For each President has his own way of doing things and he is usually too old to change.... Roosevelt would have felt hemmed in by Eisenhower's system, and Eisenhower would have been befuddled by the chaos of Roosevelt's.

*In the final analysis, it is the President's style -- his work habits, the way he likes to receive information, the sort of people he prefers to have around him, the manner in which he makes up his mind -- that will be the key to how the White House is organized. (Hess, *Organizing the Presidency*, p. 174)*

Many of the key structural issues for the modern Presidency have to do with the President's relations with Congress. Advocates of a Presidency strengthened, for example, by the addition of a line-item veto and repeal of the War Powers Act argue that the President is the only official elected by and responsible to all the people. Critics respond that Congress more truly reflects the interests and desires of a majority of Americans, as indeed it was designed to do. This debate underlies many of the contemporary disputes over presidential power.

The Constitution's framers sought a powerful Executive, one that could act quickly in a national emergency to ensure order. Thus, for example, a proposal in the Constitutional Convention to give Congress the power to "make" war was defeated, and Congress's power was limited to that of "declaring" war. But it may be asked, can a President "make" a war that has not been "declared"? The War Powers Act was designed to settle this question; but while each President since 1974 has followed its procedures, all have denied that it is binding.

The veto power was one of the most controversial features of the Presidency; many Antifederalists feared that the power would be abused. Yet Congress has found ways of reducing the threat of a Presidential veto, for example by combining several bills into a single act. The most prominent example of this technique is the appropriations process, in which all federal spending is authorized by thirteen mammoth bills. Proponents argue that a line-item veto is needed to strengthen the President's hand against what they regard as parliamentary sleight-of-hand. Others, however, note that the amount of spending that could be controlled through an item veto is relatively small, and question whether it would not create an undue shift of legislative power to the Executive. Combined with the President's extremely powerful access to the media, an item veto might prove overwhelming.

A President can not only mold public opinion through speeches and in other ways; he can also withhold information for reasons of national security. Presidents have claimed the ability to keep information not just from the people but from Congress as well. The scope of "executive privilege" remains a potential source of controversy between the President and Congress. Precedents for the practice go back as far as President Washington, but as critics in Congress and elsewhere have asked, are these precedents alone a sufficient justification? On the other hand, *The Federalist*, and others since, have noted the Executive's greater

ability to keep secrets; might it create a risk to have more people knowing secrets that might compromise national security? Who decides when withholding information is appropriate? (See the articles by Wilkinson and Kramer and Marcuse, listed in the bibliography.)

Fifty-one years ago, President Roosevelt's Brownlow Committee on Administrative Management concluded that the increasing size and complexity of the government meant that "the President needs help." As the presidential staff grew to "imperial" size, however, observers began to question whether the increasing bureaucracy was a good thing, and these questions have persisted. The questions divide into two categories. On the one hand are those who believe that a powerful Presidency tends to overawe Congress and exert too much power; in Hamilton's terms, they question its safety. The other group questions whether, in such a massive bureaucracy, a President is able to lead effectively and thus realize his policy goals, that is, whether the executive establishment has drained the "energy" from the Executive Branch.

Many questions have been raised about the Presidency and will no doubt remain part of our public discussion. Is the modern Presidency too powerful or not powerful enough? Does the President, as the elected representative of the whole nation, speak for the people? Would an improved electoral system, for example abolishing the Electoral College or instituting national primaries, ensure that the voice of the people is better heard? Or would a powerful, plebiscitary Presidency threaten the separation of powers? Should Congress instead assume a greater role in supervising the conduct and performance of the Executive Branch?

The Constitution's separation of powers virtually ensured that Congress and the President would compete for supremacy within the government. Yet throughout our history, the balance of power between the two branches has, for the most part, been maintained. Within the powers granted to each branch by the Constitution, as history has shown, considerable latitude exists for interpretation, for customs and traditions to grow up, for informal arrangements, and for adaptation to circumstances. This flexibility has been the hallmark of what Chief Justice John Marshall called a Constitution "intended to endure for ages to come and, consequently, to be adapted to the various crises of human affairs."

SELECTED BIBLIOGRAPHY

- Baker, Richard Allan. "The 'Great Departments': The Origin of the Federal Government's Executive Branch." *This Constitution: A Bicentennial Chronicle*, No. 17 (Winter, 1987).
- Berns, Walter, ed. *After the People Vote: Steps in Choosing the President*. Washington, DC, 1983.
- Corwin, Edward S. *The President: Office and Powers* (4th edition). New York, 1957.
- Dowd, Ann Reilly. "What Managers Can Learn from Manager Reagan." *Fortune*, vol. 114, no. 6 (September 15, 1986), pp. 32-41.
- Hess, Stephen. *Organizing the Presidency*. Washington, DC, 1976.
- Ketcham, Ralph. *Presidents Above Party: The First American Presidency, 1789-1829*. Chapel Hill, NC, 1984.
- Kramer and Marcuse. "Executive Privilege -- A Study of the Period 1953-1960." 29 *George Washington Law Review*, 1961, pp. 623, 827.
- Nelson, Michael, ed. *The Presidency and the Political System*. Washington, DC, 1984.
- Neustadt, Richard. *Presidential Power: The Politics of Leadership*. New York, 1960.
- Patterson, Bradley H., Jr. *The Ring of Power: The White House Staff and Its Expanding Role in Government*. New York, 1988.
- Rohr, John A. *To Run a Constitution: The Legitimacy of the Administrative State*. Lawrence, KS, 1986.
- Schlesinger, Arthur M., Jr. *The Imperial Presidency*. Boston, 1973.
- Shapiro, Martin. "The Constitution and the Bureaucracy." *This Constitution: A Bicentennial Chronicle*, No. 17 (Winter, 1987).
- Sofaer, Abraham. *War, Foreign Affairs, and Constitutional Power*. Cambridge, MA, 1976.
- Thach, Charles. *The Creation of the Presidency*. Baltimore, 1969. (1st edition, 1923).
- Tulis, Jeffrey. *The Rhetorical Presidency*. Princeton, NJ, 1987.
- Wildavsky, Aaron. "Government and the People." *Commentary*, vol. 56, no. 2 (August, 1973), pp. 25-32.
- Wilkinson. "Demands of Congressional Committees for Executive Papers." 10 *Federal Bar Journal*, 1949, pp. 103, 223, 319.